Eric W. Bloom (*Pro Hac Vice Pending*)
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 282-5000
Facsimile: (202) 282-5100
ebloom@winston.com

C. MacNeil Mitchell (*Pro Hac Vice Pending*)
WINSTON & STRAWN LLP
200 Park Avenue
Ne York, NY 10166
Telephone: (415) 591-1000
Facsimile: (415) 591-1400
cmitchell@winston.com

Richard A. Lapping (SBN: 107496)
WINSTON & STRAWN LLP
101 California Street
San Francisco, CA 94111-5802
Telephone: (415) 591-1000
Facsimile: (415) 591-1400
rlapping@winston.com

Attorneys for Applicant,
THE REPUBLIC OF ECUADOR

CRB

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re Application of: THE REPUBLIC OF ECUADOR, Applicant, For the Issuance of a Subpoena for the Taking of a Deposition and the Production of Documents In a Foreign Proceeding Pursuant to 28 U.S.C. § 1782.	CV 10 80225 MISC Case No. _____ **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AN *EX PARTE* APPLICATION FOR AN ORDER UNDER 28 U.S.C. § 1782 FOR THE ISSUANCE OF A SUBPOENA TO DIEGO BORJA FOR THE TAKING OF A DEPOSITION AND THE PRODUCTION OF DOCUMENTS FOR USE IN A FOREIGN PROCEEDING**

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

TABLE OF CONTENTS

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

OTHER AUTHORITIES

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

INTRODUCTION

Under 28 U.S.C. § 1782, "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . ." Courts ordinarily issue subpoenas pursuant to Section 1782 applications on an *ex parte* basis. *See, e.g., In re Letters Rogatory from the Tokyo District, Tokyo, Japan*, 539 F.2d 1216, 1219 (9th Cir. 1976) (finding grant of a Section 1782 subpoena request on an *ex parte* basis proper); *In re Marano*, Slip Copy, 2009 WL 482649, *2 (N.D. Cal., February 25, 2009) (same).[1] Accordingly, the Republic of Ecuador (the "Republic") hereby requests that this Court issue a FRCP Rule 45 subpoena under Section 1782 addressed to Mr. Diego Fernando Borja Sánchez ("Borja"), currently believed to reside and may be found in this judicial district, to provide a deposition and documents for use in an international arbitration (the "Treaty Arbitration") brought pursuant to the rules of the United Nations Commission on International Law ("UNCITRAL") by Chevron Corporation ("Chevron Corp.") and Texaco Petroleum Corporation ("TexPet," and the two collectively "Chevron") against the Republic of Ecuador (the "Republic") under the Ecuador-U.S. Bilateral Investment Treaty (the "BIT").

As detailed below, the deposition and documents requested are likely to be directly relevant to the Treaty Arbitration. In that proceeding, Chevron has alleged that a case currently pending in Lago Agrio, Ecuador ("the *Lago Agrio* action"), wherein Chevron has been accused of causing environmental damage totaling approximately $27 billion, is a "sham" because the Ecuadorian judiciary is neither independent nor impartial. In support of its argument, Chevron has submitted clandestine videotapes taken by Mr. Borja and Wayne Hansen ("Hansen") that Chevron claims shows that the judge then presiding over the *Lago Agrio* action was biased in favor of the Ecuadorian plaintiffs and was offered bribes from the two men to rule against Chevron. Chevron has asked the tribunal in the Treaty Arbitration to review and rule upon the underlying merits of *Lago Agrio* action, seeking, *inter alia,* a determination of "no liability" in the environmental action on multiple bases, including its claim that it has been denied due process. Thus, this request is directly relevant to the Republic's defense in the Treaty Arbitration, will help to determine the

[1] The subpoenaed party and any Interested Party may, of course, file a motion to quash the subpoena, once issued, should they determine that a basis exists for such relief.

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

authenticity, importance and relevance of Chevron's videotape evidence, and to discover the underlying motives for Borja to produce such clandestine videotapes.

Pursuant to the express statutory authority of 28 U.S.C. § 1782, the Republic seeks an order allowing it to issue a subpoena to obtain discovery from and depose Mr. Borja. Consistent with the liberal discovery provided under the Federal Rules, the standard to issue a subpoena under Section 1782 is low: (i) the target of the subpoena must "reside" or be "found in" this Court's district, (ii) the discovery must be sought for "use in" a foreign or international proceeding, and (iii) the applicant must be an "interested person" in that proceedings. *See* 28 U.S.C. § 1782. As detailed below, those requirements are readily met here. In addition, the four discretionary factors analyzed by courts when considering applications under Section 1782, discussed in detail *infra*, all support an order authorizing subpoenas seeking documents from and a deposition of Mr. Borja. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65, 124 S. Ct. 2466 (2004) (describing discretionary factors). Thus, the Republic respectfully requests that this *ex parte* application be granted, and that the requested subpoena be issued at the earliest possible juncture.

Chevron has to date made at least ten similar Section 1782 applications in nine different judicial districts in connection with the Treaty Arbitration and the *Lago Agrio* action, and thus could not in good conscience oppose the Republic's instant application for the identical relief.

FACTUAL BACKGROUND

I. Texaco Petroleum Company's Operations In Ecuador

From 1964 through June 1992, TexPet, then a wholly-owned subsidiary of Texaco, Inc. ("Texaco"), was a partial equity owner (50 percent and later 37.5 percent) of an oil exploration and development concession in the *Oriente* (Eastern) section of Ecuador's Amazonian rain forest (the "Concession"). By contract, TexPet served as the sole Operator of the Concession for twenty-five years, from 1965-1990. As Operator, TexPet "conducted the physical exploration and production activities" in the Concession,[2] and the Republic relied on TexPet's expertise to determine and use the appropriate technology and production methods.[3] However, various experts have opined that

[2] Ex. 1, Defendants' Amended Motion to Dismiss Complaint or, in the Alternative, to Stay (May 25, 2006) at 3, filed in *Doe v. Texaco Inc.*, C 06-02820 (N.D. Cal.). "Ex. __" refers to the exhibits to the Declaration of Eric W. Bloom filed concurrently herewith.

[3] Ex. 2, Sworn Statement of Luis Arturo Araujo (Jan. 26, 1996) ¶ 5 ("Texaco's duties included

practices adopted by TexPet as cost-cutting measures, including, *e.g.*, (a) using unlined waste pits located next to each well and (b) discharging "water of production" (liquids filled with highly toxic chemicals and high salinity) directly onto the ground or into the streams and rivers of the *Oriente*. According to these experts, TexPet's operating practices resulted in extensive pollution and damage to the environment of the region. A damages expert appointed by the *Lago Agrio* court has calculated future remediation costs and past damages to the affected persons and property in the *Oriente* at up to $27.3 billion.

In July 1990, a subsidiary of the state-owned oil company, PetroEcuador, took over the role of Concession Operator. In June 1992, TexPet's ownership interest in the Concession expired. *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 338-41 (S.D.N.Y. 2005) ("*ROE I.*").[4]

II. The *Aguinda* Action in New York

In 1993, slightly more than one year after TexPet's interest in the Concession had expired, a group of indigenous residents of the *Oriente* region filed a class action complaint against Texaco in the United States District Court for the Southern District of New York (the "*Aguinda* action"). The *Aguinda* plaintiffs alleged that Texaco, through its TexPet subsidiary, had polluted private and public lands and streams in Ecuador from 1964 through 1992, and demanded both monetary damages and extensive equitable relief "to compel the cleanup of their community's environmental

---

the complete control of the seismic exploration, exploitation, production, design, the excavation of the wells, the extraction of the petroleum, and all the other tasks necessary to exploit the petroleum which this company found in the Ecuadorian Amazon"); ¶¶ 11-12 (since no one in the Ecuadorian Government "had sufficient knowledge to oppose or to judge the Texaco Company in reference to any issues pertaining to the petroleum industry," TexPet was "permitted . . . to introduce whatever technology it deemed adequate as environmental policy"; ¶ 14 (TexPet "never suggested to anybody in the government that the practices which they employed, and which resulted in the dumping of petroleum and other contaminants into the Amazon were practices that were not carried out in any other country"); *see also* Ex. 3, Excerpts from Deposition of Edmundo Brown (Dec. 19, 2006) at 50:1-5, 50:17-51:7 (the state-owned oil company, CEPE (later PetroEcuador), had limited input into the Concession's work program and budget and "[t]he management of the operations was basically in the hands of Texaco"); *id.* at 53:8-13 ("Texaco as operator was responsible and had the technology, had the staff, had the entire control in its hands . . . . We in CEPE were spectators outside the operation.").

[4] This dispute has a long history of judicial discovery and decision so that references to judicial opinions constitute authoritative summaries of facts already judicially established.

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

resources." *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473-74 (2d Cir. 2002) ("*Aguinda II*"); *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d, 452, 456 (S.D.N.Y. 2007) ("*ROE II*").

Texaco filed a motion to dismiss the *Aguinda* action on grounds of, *inter alia*, *forum non conveniens*, arguing that every issue raised in the plaintiffs' complaint should be tried in the Ecuadorian courts, and submitting numerous affidavits from Ecuadorian law experts who attested that the Ecuadorian courts would provide a fair and adequate forum for the claims the *Aguinda* plaintiffs were asserting. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 544-46 (S.D.N.Y. 2001) ("*Aguinda I*"). Thus, for example, in 1995, in support of its *forum non conveniens* motion, Texaco submitted an affidavit from the distinguished Ecuadorian lawyer Dr. Alejandro Ponce Martinez averring that:

> I have reviewed the pleadings in *Maria Aguinda, et al. v. Texaco, Inc.* . . . In my opinion, based upon my knowledge and expertise, the Ecuadorian courts provide a totally adequate forum in which these plaintiffs fairly could pursue their claims. I believe that the Ecuadorian judicial system would resolve the plaintiffs' claims in a proper, efficient and unbiased manner. . . . The civil procedures utilized in Ecuadorian courts are essentially those used in other civil jurisdictions, such as Spain, France, Germany and Japan. While different from procedures used in common law jurisdictions like the United States, they permit the effective resolution of civil claims.[5]

In 1996, the District Court granted Texaco's motion and dismissed the case on *forum non conveniens* grounds.[6] However, in 1998 the Second Circuit vacated the dismissal and remanded the case to the lower court, holding (in part) that a *forum non conveniens* dismissal was inappropriate absent a requirement that Texaco consent to Ecuadorian jurisdiction and agree to certain other stated conditions.

Following the Second Circuit's remand, Texaco consented to jurisdiction in Ecuador, and further expressly committed to satisfy any "final judgment" against it (defined as a judgment after exhaustion of all appeal rights in Ecuador), subject "only" to its right to defend against enforcement under the specific defenses set forth in New York's Recognition of Foreign Country Money-Judgments Act, N.Y. C.P.L.R. 5304 ("NY Foreign Judgments Act").[7] When the District Court

[5] Ex. 4, Affidavit of Dr. Alejandro Ponce Martinez (Dec. 13, 1995) ¶¶ 3-5.
[6] *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 626 (S.D.N.Y. 1996).
[7] *See, e.g,* Ex. 5, Texaco Inc.'s Objections and Responses to Plaintiffs' Interrogatories Regarding Proposed Alternative Fora (Dec. 28, 1998) at 3, filed in *Aguinda v. Texaco Inc.*, No 93-CIV-7527 (S.D.N.Y.); Ex. 6, Excerpt from Texaco Renewed MTD Reply, at 21, filed in Aguinda *v.*

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

requested additional briefing regarding the adequacy of Ecuador's judiciary, Texaco submitted *ten* supplemental affidavits from their Ecuadorian legal experts once again uniformly reconfirming their opinions as to the fairness and adequacy of Ecuador's courts and disputing statements in U.S. Department of State Human Rights reports that characterized the Ecuadorian judiciary as being "politicized, inefficient, and sometimes corrupt."[8] Texaco's experts affirmed to the District Court, under penalty of perjury, that "Ecuador's judicial system is neither corrupt nor unfair"; that "the courts of Ecuador . . . treat all persons who present themselves before them with equality and in a just manner"; and that the Ecuadorian judiciary was fully independent.[9]

The *Aguinda* plaintiffs again vigorously opposed Texaco's dismissal motions. Finally, in 2001, the District Court again dismissed the case on the ground of *forum non conveniens*. *Aguinda I*, 142 F. Supp. 2d at 534. The Second Circuit this time affirmed the dismissal. *Aguinda II*, 303 F.3d at 470.

III. The Settlement And Release Agreements Between The Republic, Texaco and TexPet

While the *Aguinda* action was pending, the Republic, PetroEcuador, and TexPet entered into a 1994 Memorandum of Understanding, a 1995 Settlement Agreement and a 1998 Final Release regarding environmental remediation. Under these agreements, TexPet agreed to perform specified remedial work in exchange for a release by the Government and PetroEcuador (the "Releasors") of all of the Government's and PetroEcuador's claims against TexPet, Texaco, other related entities and their successors (the "Releasees") "arising from the Operations of the Consortium, except for those related to the obligations contracted" under the 1995 Settlement Agreement itself. *ROE I*, 376 F. Supp. 2d at 341-42. These agreements "applied *without prejudice to the rights possibly held by third parties* for the impact caused as a consequence of the operations of the former PetroEcuador-Texaco

---

Texaco Inc., No 93-CIV-7527 (S.D.N.Y.).

[8] *See Aguinda I.*, 142 F. Supp. 2d at 544-45.

[9] *See, e.g.*, Ex. 7, Affidavit of Dr. Enrique Ponce y Carbo (Feb. 4, 2000) ¶¶ 15, 17; Ex. 8, Affidavit of Dr. Alejandro Ponce Martinez (Feb. 9, 2000) ¶¶ 5, 7; Ex. 9, Affidavit of Dr. Sebastian Perez-Arteta (Feb. 7, 2000) ¶¶ 4, 7; Ex. 10, Affidavit of Rodrigo Pérez Pallares (Feb. 4, 2000) ¶¶ 3-4, 6; Ex. 11, Supplemental Affidavit of Dr. Alejandro Ponce Martinez (Apr. 4, 2000) ¶¶ 5-7; Ex. 12, Affidavit of Jaime Espinoza Ramírez (Feb. 28, 2000) ¶¶ 2-6; Ex. 13, Affidavit of Ricardo Vaca Andrade (Mar. 30, 2000) ¶¶ 4-7.

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

Consortium."[10] Nor did any of these agreements contain a "hold harmless" or indemnification provision from the Releasors. Indeed, under the Ecuadorian Constitution, the Republic, even if it had the *intent*, did not have the *power* to waive the rights of its citizens to pursue their own third-party claims for damages or for remediation of the environmental damage caused by Releasees.[11] Subsequent to the execution of the 1998 Final Release, questions arose about the adequacy of the remediation work performed by TexPet, leading to several criminal investigations in Ecuador, one of which, naming the seven Ecuadorian officials and two Chevron representatives who signed the 1998 Final Release, is currently pending.[12]

IV. The *Lago Agrio* Action

In 2003, following the *forum non convienens* dismissal of the *Aguinda* action in New York, a subset of most, but not all, of the *Aguinda* plaintiffs re-filed their dismissed action in the Superior Court located in Lago Agrio, Ecuador, against Chevron, which had by then acquired Texaco and its subsidiaries through merger. *ROE I,* 376 F. Supp. 2d at 341, 342. As was the case in the *Aguinda* action, the *Lago Agrio* plaintiffs alleged that the oil exploration and exploitation activities carried out by TexPet, as Operator, caused contamination in the *Oriente* and harmed the people residing in the region, and that the methods and technology that TexPet employed as Operator had already been prohibited in other countries "due to their lethal effects on the environment and human health." The *Lago Agrio* plaintiffs further alleged that TexPet's "willful misconduct" and "negligence" had caused severe contamination of the land and waters in the region, affecting not only the drinking water and crops, but also the livelihood, culture and general health of the population, which saw a rise in cancer, birth defects, and other illnesses.[13] In essence, the *Lago Agrio* complaint, even though necessarily filed under a civil law system divergent from U.S. common law jurisprudence (a requirement acknowledged and approved by Chevron's legal experts in their expert opinions on the adequacy of the Ecuadorian judiciary)[14] paralleled and even largely tracked the language of the

[10] Ex. 14, Memorandum of Understanding among TexPet, the Ministry of Energy and Mines, and PetroEcuador (Dec. 14, 1994) art. VIII.

[11] Ex. 15, Excerpt from Foreign Law Declaration of Genaro Eguiguren and Ernesto Albán (Dec. 20, 2006) ¶ 113.

[12] Ex. 16, Declaration of Attorney Jamie Donoso (Apr. 29, 2010) ¶¶ 2-3, 5.

[13] Ex. 17, Complaint in *Aguinda v. ChevronTexaco Corp.*, Case No. 002-2003, Superior Court of Nueva Loja (May 7, 2003) §§ I (5), I (7), III (1)-(5), IV (5)-(6), IV (9).

[14] *See* Affidavits cited *supra* in nn.4, 8.

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

Aguinda complaint, and the *Lago Agrio* plaintiffs once again demanded that: (i) medical monitoring and care be established for the affected residents; (ii) the polluting elements still in the region be removed; and (iii) remediation be performed on both private and public lands to repair the environmental damage caused by the oil operations conducted while TexPet operated the Concession.[15]

The *Lago Agrio* action has proceeded in Ecuador since 2003, with numerous judicial site inspections, thousands of test samples, and voluminous reports by both party-appointed and court-appointed experts investigating and analyzing the extent and causes of pollution in the Concession area.[16] In 2008 the court-appointed global damages expert filed a 4,000 page report and a follow-up report estimating damages in a range up to US $27.3 billion.[17] No decision has yet been issued, and the *Lago Agrio* court recently estimated that it would be at least six to eight more months before judgment would be rendered in the case.[18]

V. The AAA Arbitration and AAA Stay Action

As had been true with respect to the *Aguinda* action, the complaint in the *Lago Agrio* action did not name the Republic or any of its agencies or instrumentalities as a party. And although it could have done so, and indeed it advised the Second Circuit that it would do so,[19] Chevron made no effort to implead the Republic into the *Lago Agrio* action. But as the *Lago Agrio* case marched forward, and Chevron was forced to confront the allegations brought by the Ecuadorian indigenous community against it, in June, 2004 Chevron attempted, ultimately unsuccessfully, to bring a separate AAA arbitration proceeding in New York against PetroEcuador (the "AAA Arbitration") seeking a declaration that PetroEcuador was contractually obligated to indemnify Chevron for all defense costs and liability that Chevron had incurred or might in the future incur in defending the *Lago Agrio* action.[20] PetroEcuador and the Republic filed a petition to stay the AAA arbitration in

[15] Ex. 17, Complaint, *Aguinda v. ChevronTexaco Corp.*, Case No. 002-2003, Superior Court of Nueva Loja (May 7, 2003) § VI.
[16] Ex. 18, Declaration of Andrew Woods (Mar. 3, 2010) ¶ 8, filed in *Chevron Corp. v. Stratus Consulting, Inc.*, No. 10-cv00047-JLK, Trans. (D. Colo. Mar. 4, 2010).
[17] Ex. 19, Notice of Arbitration (Sept. 23, 2009) ¶¶ 48-49.
[18] Ex. 20, Letter from Hon. I. Ordóñez to M. Doe (June 17, 2010).
[19] Ex. 21, Excerpts from Brief for Defendant Appellee (Dec. 20, 2001) at 51, filed in *Aguinda v. Texaco, Inc.*, Case No. 01-7756(L).
[20] Ex. 22, ChevronTexaco Corp. and Texaco Petroleum Co.'s Demand for Arbitration (June 2004).

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

New York State court, and Chevron and TexPet removed the case to the District Court for the Southern District of New York (the "AAA Stay Action").

The principal issue in the AAA Arbitration, and subsequently a key issue in the AAA Stay Action, was whether the Republic was contractually bound by the terms of a 1965 Joint Operating Agreement ("JOA") that neither the Republic nor PetroEcuador had ever signed, but which Chevron alleged was binding on PetroEcuador and required that it indemnify Chevron for its costs and potential liability in defending the *Lago Agrio* action. In its counterclaims in the AAA Stay Action, Chevron also asserted that TexPet had been released from liability for the claims asserted by the *Lago Agrio* plaintiffs by virtue of the 1995 Settlement Agreement and 1998 Final Release, and that the Republic was in breach of those agreements by "allowing the Lago Agrio lawsuit to proceed" and by "refusing to inform the court in Lago Agrio that [the Republic] owned and released all rights to environmental remediation or restoration by TexPet in the concession area, without indemnifying [Chevron] and TexPet for any of their costs in that litigation." *ROE I*, 376 F. Supp. 2d at 344. In addition to seeking an award of costs, legal defense fees, and the amount of any adverse judgment which might be rendered against it in the *Lago Agrio* action, Chevron sought a declaratory judgment that "the Republic and PetroEcuador are in breach of their obligations under the 1995 Settlement and 1998 Final Release of Claims" and were "obligated to intervene in the Lago Agrio litigation and inform the Ecuadorian court that they owned and released all rights to environmental remediation or restoration by TexPet in the concession area." *Id.* at 345. Following extensive discovery, cross-motions for summary judgment, and an evidentiary hearing on the applicable Ecuadorian law, in June 2007 the District Court issued a decision and order permanently staying the AAA Arbitration on the ground that the Republic was not contractually bound by the JOA. *ROE II*, 499 F. Supp. 2d at 452. On appeal, the District Court's decision staying the AAA Arbitration was summarily affirmed by the Second Circuit Court of Appeals. *Republic of Ecuador v. ChevronTexaco Corp.*, 296 F. App'x 124 (2d Cir. 2008). The United States Supreme Court denied *certiorari* on June 29, 2009. *ChevronTexaco Corp. v. Republic of Ecuador*, __ U.S. __, 129 S. Ct. 2862 (2009).

Chevron's counterclaims relating to the 1995 Settlement Agreement and 1998 Final Release were not resolved by the June 2007 decision and order. During the pendency of the AAA Stay

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

Action appeals, Chevron initially insisted that its counterclaims remained ripe for adjudication, and urged the District Court to schedule proceedings to rule on the pending cross-motions for summary judgment with respect to the counterclaims. Chevron simultaneously opposed the Republic's efforts to have the counterclaims dismissed for lack of subject matter jurisdiction.[21] Following the Supreme Court's denial of *certiorari* in June 2009, Chevron thought better of having its remaining claims decided by the District Court, instead advising the Court that "Chevron no longer wishes to press its opposition to The Republic's motion to dismiss all remaining counterclaims for lack of subject matter jurisdiction . . . . Dismissal for lack of subject matter jurisdiction would appear to moot the parties' cross-motions for summary judgment and . . . would conclude all proceedings before this Court."[22] In accordance with Chevron's decision to withdraw its opposition, on July 20, 2009, the District Court dismissed all remaining counterclaims in the AAA Stay Action.[23]

VI. Chevron's Notice Of Arbitration Under The UNCITRAL Arbitration Rules In Contravention Of Its Representations To The *Aguinda* Court

Now apparently suffering buyer's remorse and regretting having convinced the *Aguinda* court to send the case from New York to Ecuador; given the site inspection and sampling results; having lost their AAA Arbitration effort to compel the Republic to adjudicate its alleged obligations to Chevron in the AAA Arbitration; and having elected to allow their 1995 Settlement Agreement and 1998 Final Release claims pending before the AAA Stay Action court to be dismissed before adjudication on the merits, on September 23, 2009 Chevron and TexPet filed a Notice of Arbitration under the UNCITRAL arbitration rules.

In the Notice, Chevron alleged violations of the US-Ecuador BIT relating to the *Lago Agro* action — despite the fact that no judgment has been rendered in that case.[24] Chevron's filing has

---

[21] Ex. 23, letter from Chevron's counsel to Judge Sand (Oct. 30, 2008) at 7.

[22] Ex. 24, letter from Chevron's counsel to Judge Sand (Jul. 13, 2009) at 1-2.

[23] Ex. 25, Order entered in *Republic of Ecuador v. ChevronTexaco, Inc.*, No. 04 CV 8378 (S.D.N.Y. July 20, 2009).

[24] Among other things, Chevron claims in the Notice (Exhibit 19) that it has been denied due process and fair and equitable treatment during the course of the *Lago Agrio* action as the result of (i) alleged fraud committed by the *Lago Agrio* plaintiffs in connection with expert reports submitted in the proceeding and collusion between the court-appointed global damages expert and plaintiffs; (ii) alleged collusion between the Republic and the *Lago Agrio* plaintiffs; (iii) alleged political interference and pressure on the judges who have presided over the *Lago Agrio* action; and (iv) a "sham" criminal proceeding involving two Chevron lawyers (as well as former Government and PetroEcuador officials) who were involved in certifying the satisfactory completion of the

been a transparent attempt to effectively transfer the *Lago Agrio* action, as well as the counterclaims it had brought before the District Court in New York, from the *Lago Agrio* and New York courts to international arbitration. In so doing, Chevron plainly hopes that a panel of arbitrators would do what no court thus far had been willing to do — compel the Republic to somehow force the *Lago Agrio* court to summarily dismiss the *Lago Agrio* plaintiffs' claims in a case in which the Republic is not even a party and which the *Lago Agrio* plaintiffs had been prosecuting – first in New York, and then, at the urging of Texaco and Chevron, in Ecuador – for seventeen years.

By seeking an order from the Treaty Arbitration tribunal compelling the Republic to interfere in the *Lago Agrio* action and "inform the court . . . that TexPet, its parent company, affiliates, and principals have been released from all environmental impact arising out of the former Consortium's activities and that Ecuador and PetroEcuador are responsible for any remaining and future remediation work,"[25] Chevron seeks nothing less than an award compelling the Republic's executive branch to wrest control of the *Lago Agrio* action from its judiciary. Additionally, in pursuing the BIT arbitration, Chevron is violating its representations to the *Aguinda* court that, following exhaustion of appellate remedies in Ecuador, it would "satisfy" any *Lago Agrio* judgment, reserving its right to defend enforcement of that judgment extraterritorially "only" under the NY Foreign Judgments Act, N.Y. C.P.L.R. § 5304.[26]

The Treaty Arbitration is still in its relative infancy. At this point, the arbitral tribunal has generally agreed to bifurcate the proceedings so that it can first determine whether it has jurisdiction to hear the claims before having to decide the merits of the case. The Republic filed its jurisdictional objections on July 26, 2010. The parties are scheduled to submit briefs on the question of jurisdiction over the next several months and a jurisdictional hearing is scheduled for November 22-

---

remediation performed under the 1995 Settlement Agreement.

[25] Ex. 19, Notice of Arbitration (Sept. 23, 2009) at ¶ 76(3),

[26] On December 3, 2009, the Republic filed a Petition in the U.S. District Court for the Southern District of New York seeking to permanently enjoin Chevron and TexPet from continuing to prosecute the BIT arbitration in breach of Chevron's representations to the *Aguinda* court. Chevron and TexPet responded by filing a Motion to Dismiss. Following oral argument, the District Court granted Chevron's and TexPet's Motion to Dismiss and denied as moot the Republic's cross-motions for summary judgment and a preliminary injunction, finding that under New York state precedent, if even one of the asserted claims was arbitrable, the court was required to send all the claims to arbitration. The Republic has appealed this ruling and a final decision is currently pending.

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

23, 2010. A decision on jurisdiction is expected some time in early 2011. At their request, Chevron and TexPet will also submit their opening brief on the merits on September 6, 2010.

VII. The Purported Bribery Scheme

On August 31, 2009, with great fanfare Chevron issued a press release that it had uncovered a "bribery scheme," which it alleged implicated both the judge presiding over the *Lago Agrio* trial and Ecuadorian government officials:

> Chevron Corp. . . . today provided authorities in Ecuador and the U.S. with video recordings that reveal a $3 million bribery scheme implicating the judge presiding over the environmental lawsuit currently pending against the company and individuals who identify themselves as representatives of the Ecuadorian government and its ruling party. In the videos, the judge confirms that he will rule against Chevron and that appeals by the energy company will be denied – even though the trial is ongoing and evidence is still being received. A purported party official also states that lawyers from the executive branch have been sent to assist the judge in writing the decision. The recorded meetings also show an individual who claims to be a representative of Ecuador's ruling political party, Alianza PAIS, seeking $3 million in bribes in return for handing out environmental remediation contracts to two businessmen after the verdict is handed down. Of that sum, he said $1 million would go to Judge Juan Núñez, $1 million would to 'the presidency' and $1 million to the plaintiffs.[27]

According to Chevron, the videos were made by two "prospective environmental remediation contractors,"[28] Mr. Borja, an Ecuadorian citizen who, per Chevron, had worked for Chevron's *Lago Agrio* defense team as a "logistics contractor," and Wayne Hansen, a U.S. citizen with whom Chevron said it had no relationship. The two used a "Spyer Agent Watch" and a "Spy Pen" purchased from the *Sky Mall* catalogue to surreptitiously record four meetings in Ecuador in May and June, 2009.[29] In a declaration posted on Chevron's website, Mr. Borja additionally claimed to have had meetings in April, 2009 with a private attorney and a purported representative of *Alianza Pais*, the political party of Ecuadorian President Correa, in which the $3 million bribe had been requested.[30] Chevron asserted that the recordings had been made without its knowledge and that "neither man had been paid to provide the recordings to Chevron," although it admitted that,

---

[27] Ex. 26, Chevron Press Release, *Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit* (Aug. 31, 2009) at 1.

[28] Ex. 27, Letter from T. Cullen to Dr. W. Pesántez (Aug. 31, 2009) at 1.

[29] Ex. 26, Chevron Press Release, *Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit* (Aug. 31, 2009) at 1-2; Ex. 28, Statement by Diego Borja (Oct. 16, 2009) ¶¶ 8, 11.

[30] Ex. 28, Statement by Diego Borja (Oct. 16, 2009) ¶¶ 4, 5.

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

supposedly out of concern for Mr. Borja's safety, Chevron had "assisted him and his family with relocation expenses and other interim support."[31] Chevron subsequently acknowledged that it was also paying for criminal defense counsel for Mr. Borja and had offered to pay for Mr. Hansen's counsel as well as for his "reasonable security needs."[32]

Following Chevron's press release and posting of the tapes (complete with English subtitles) and transcripts on its website, the Republic's Prosecutor General commenced an investigation concerning all of the individuals named in Chevron's allegations, and the Ecuadorian National Judiciary Council opened an independent investigation regarding Judge Núñez.[33] Judge Núñez, while denying any wrongdoing,[34] recused himself from the *Lago Agrio* proceeding so as to eliminate any appearance of impropriety.[35] Independent journalists, following review of the videotapes, began to question Chevron's statements regarding what the tapes actually showed, noting, *inter alia*, that "[i]t was not clear . . . whether Judge Nunez was even aware of the plans to bribe him"[36] and that:

> On the tapes, the men – a former Chevron contractor and an American businessman – press Nuñez to say how he will rule, without success. Then, as Nuñez prepares to leave, one of the men maintains that Chevron is guilty, and Nuñez replies, "Yes, sir." To Chevron, this cinches the argument. *But on the video, it's unclear to whom the judge is speaking and whether he is responding to the question or just trying to end the meeting.*[37]

Notwithstanding that its interpretation of the secretly taped "evidence" was at best subject to debate, Chevron also invoked "the bribery scandal" in the Notice filed in the Treaty Arbitration,

---

[31] Ex. 26, Chevron Press Release, *Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit* (Aug. 31, 2009) at 2.

[32] Ex. 29, Letter from T. Cullen to Dr. D. Garcia Carrión (Oct. 26, 2009) at 9.

[33] Ex. 30, Office of Attorney General Press Release (Sept. 16, 2009).

[34] Ex. 31, Juan Núñez Answers to Oral Requests for Admissions, Office of the President of the Provincial Court of Justice of Sucumbios (Nov. 18, 2009).

[35] Ex. 32, Ruling (Sept. 28, 2009) at 1, 2.

[36] Ex. 33, *Ecuador Oil Pollution Case Only Grows Murkier*, NEW YORK TIMES (Oct. 9, 2009) at 2 (emphasis added); *see also* Ex. 34, *Chevron Judge Says Tapes Don't Reveal Verdict*, SFGATE.COM (Sept. 2, 2009) ("[T]he taped conversations with the judge himself do not ever explicitly discuss bribes. Núñez repeatedly tells the businessmen that he can't discuss the verdict in advance."). Chevron which had initially claimed that it had no advance knowledge of any of the taping, was also forced to admit that its counsel had met with Borja and Hansen in advance of the fourth taped meeting (the only meeting where, at Mr. Borja's urging, the "bribery plot" was specifically discussed). Ex. 29, Letter from T. Cullen to Dr. D. Garcia Carrión (Oct. 26, 2009) at 8.

[37] Ex. 35, *Chevron's Legal Fireworks*, LOS ANGELES TIMES (Sept. 5, 2009) (emphasis added); *see also* Ex. 36, *Chevron Steps Up Ecuador Legal Fight*, FINANCIAL TIMES (Sept. 1, 2009) ("The judge refuses several times on the tape to reveal the verdict, before saying "Yes, sir," when asked if he will find Chevron guilty. However, the video raises the question as to whether Judge Nuñez understood what he was being asked.").

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

claiming that the alleged bribery plot served as evidence that Chevron was being denied due process in the *Lago Agrio* action.[38] Chevron has also apparently advised Mr. Borja that he will likely be a witness on their behalf at the "Hague," *i.e.*, in the Treaty Arbitration, if that matter proceeds to "trial.".[39]

VIII. Messrs. Borja And Hansen Turn Out Not To Be The "Good Samaritans" Described By Chevron

An investigation conducted by the Associated Press and a second investigation commissioned by counsel for the *Lago Agrio* plaintiffs revealed that "U.S. businessman" Wayne Hansen, who supposedly had a remediation company with projects in the U.S. and Mexico and "an exclusive deal franchise for Honeywell for water treatment plants,"[40] was instead a convicted felon who had served 19 months in the U.S. for drug trafficking[41]; had no known credentials in the remediation field[42]; and no relationship with Honeywell.[43] Computer messages exchanged between Mr. Borja and his long-time acquaintance, Santiago Escobar, suggest that Mr. Borja had chosen Hansen to participate in the surreptitious taping precisely *because* Hansen's checkered past meant that Borja would then be the "only source of reliable information," and thus would have more leverage with Chevron.[44]

---

[38] Ex. 19, Notice of Arbitration (Sept. 23, 2009) at ¶¶ 52-54; *see also* Ex. 37, Chevron Press Release, *Chevron Files International Arbitration Against the Government of Ecuador Over Violations of the United States-Ecuador Bilateral Investment Treaty* (Sept. 23, 2009) at 2 ("The judge presiding over the trial has publicly revealed bias and pre-judgment of the case in . . . recorded meetings with individuals who had been solicited by officials of Ecuador's ruling political party to pay a bribe in exchange for the award of contracts to be funded with the proceeds of an anticipated verdict against Chevron."); *see also* Ex. 38, *Revelation Undermines Chevron Case in Ecuador*, NEW YORK TIMES (Oct. 30, 2009) at 2 (quoting Chevron spokesperson as alleging that the videotapes and transcripts show "extensive government interference in the trial and a bribe plot involving $3 million.").

[39] Ex. 39, Message Log (Nov. 26, 2009) at 21, 22; Ex. 40, Transcript for Oct. 1, 2009 (12:51:02) at 3; Ex. 41, Transcript for Oct. 1, 2009 (13:03:33) at 1.

[40] Ex. 42, Chevron transcript of "Recording 1" (May 11, 2009) at 7-8.

[41] Ex. 43, Associated Press, *Felon Recorded Videos Used by Chevron in Ecuador* (Oct. 30, 2009).

[42] Ex. 44, G. Fine, *Report of Investigation* (Oct. 29, 2009) at 2, 4-5; *see also id.* at 1 (The information we have gathered regarding Wayne Hansen's character raises serious doubts that Hansen would participate in the making of the videos out of a sense of civic duty.").

[43] *Id.* at 2; Ex. 43, Associated Press, *Felon Recorded Videos Used by Chevron in Ecuador* (Oct. 30, 2009) at 2.

[44] Ex. 39, Message Log (Nov. 26, 2009) at 24 (Borja knew about Hansen's past "from the get go" and the fact that Hansen was "disreputable . . . . leaves me as the only source of reliable information."). Borja also suggests that he set Hansen up to demand more than a million dollars from Chevron for his cooperation, knowing that the company would reject such an overt demand and

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

Mr. Borja also appears to be other than as advertised by Chevron. In the recordings made by Mr. Escobar of his conversations with Mr. Borja,[45] Mr. Borja states that instead of being merely a "logistics contractor" used by Chevron in the recent past:

- He has worked for Chevron since at least 2004.[46]
- He formed four companies for Chevron to make the work he did appear to be independent of Chevron.[47]
- His wife also worked for Chevron and both he and his wife signed documents as representatives of Severn Trent Labs, a supposedly independent lab used to test Chevron samples from the *Lago Agrio* site inspections.[48]
- Mr. Borja and his Chevron "boss" attempted to infiltrate a lab used by the *Lago Agrio* plaintiffs, using false names to enter the premises.[49]

While disclaiming any intent to "blackmail" Chevron since "I prefer to have powerful friends,"[50] Mr. Borja has also stated that he has incriminating evidence that (a) would cause Chevron to lose the *Lago Agrio* action and (b) cause it problems in the United States:

- "I have the [e]mails, I have a lot of things . . . . Did you think I was going to jump into the water without that? . . . They're shit! I have correspondence that talks about things you can't even imagine, dude. I mean things that . . . for them can . . . it's, I can't talk about them here, dude, because I'm afraid, but they're things that can make the Amazons win this just like that [snapping fingers] . . . . I mean, what I have is conclusive evidence, photos of how they managed things internally."[51]
- Mr. Borja claims that if the U.S. court which sent the *Aguinda* case to Ecuador "found out that [Chevron] did all that, they'll never believe anything they say . . . . If the judge here finds out that the company did things crookedly, he'll say, 'Tomorrow we better close them down.'"[52]

"that leaves me as the only possibility, get it? . . . I had to get rid of the competition . . . . So I piqued his interest." *Id.* at 8; *see also id.* at 15 ("the more he [Hansen] screws things up, the greater my strength").

[45] Mr. Escobar, who has been a social acquaintance of Mr. Borja for 15 years, recorded approximately six hours of conversations with Mr. Borja via Skype and also preserved copies of on-line "chats" between himself and Mr. Borja during the months of August through October 2009. Mr. Escobar told an investigator hired by the *Lago Agrio* plaintiffs that he had become "indignant" after learning about Borja's role in the videos released by Chevron and had initiated the contacts with Mr. Borja on his own initiative. Ex. 45, G. Fine, *Report of Investigation* (Apr. 5, 2010) at 1, 8.

[46] Ex. 46, Transcript for Oct. 1, 2009 (14:04:23) at 6.

[47] Ex. 41, Transcript for Oct. 1, 2009 (13:03:33) at 9.

[48] Ex. 46, Transcript for Oct. 1, 2009 (14:04:23) at 7-8; Ex. 47, examples of STL Laboratory Chain of Custody Records and Analysis Report cover page signed by Mr. Borja and his wife, respectively.

[49] Ex. 46, Transcript for Oct. 1, 2009 (14:04:23) at 10-11.

[50] Ex. 39, Message Log (Nov. 26, 2009) at 6.

[51] Ex. 48, Transcript for Oct. 1, 2009 (12:36:08) at 8-9.

[52] Ex. 41, Transcript for Oct. 1, 2009 (13:03:33) at 10-11.

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

Mr. Borja also made clear that while Chevron could not pay him before he testified on its behalf, he was definitely anticipating a payoff from Chevron in the future:

- "[B]efore I give them the things they said, 'Look, we can't give you money because' . . . you can't go and buy evidence as if they sold it in the supermarket . . . . So they said, instead of giving you money, we can give you other things . . . . What we can do is . . . . You're our business partner' you get it? Now, that little word means a lot things, right?. . . . I mean it's a brass ring this big, brother."[53]

- "There are a lot of ways they [Chevron] can do it [pay Borja] but . . . right now it's too . . . it's too obvious. . . . I mean, their ability to help me is limited, you get it? Until this thing diffuses a bit. It's still very fresh."[54]

- Borja claims he told Chevron that "'[o]bviously, I'm not going to ask you for anything right now, because it would ruin the evidence and everything' . . . . but it's totally understood, you get it? . . . So, what I'm looking at [is] things long term. I mean, they shouldn't come to me with small gifts, no way. Q [Escobar]: Okay. You want something . . . big. A. [Borja]: Of course. More than big . . . it's not something big, but just security. Q: [Escobar]: Okay. Security in all aspects: economically, family, occupational. A: [Borja]: Of course. The things that you kill yourself your whole life for. I want to have them ready so I don't have to worry."[55]

- In the interim, Chevron has been paying "all [Borja's] expenses, my car, everything with . . . it's like if you were to do a consulting job in Ecuador . . . So I just spend and they cover me. I mean, there isn't an amount." Borja claims not to know how much Chevron has spent on him since the time he left Ecuador "but [it's] a lot."[56]

Mr. Borja also admitted during his taped conversations with Mr. Escobar that he destroyed the first videotape he made (but did not explain why)[57] and that what is shown on the videos amounts to "about 30% of everything I know . . . . I know a lot more than the videos."[58]

ARGUMENT

I. Section 1782 Entitles The Republic To The Requested Discovery

The discovery sought by the Republic is precisely the sort of discovery contemplated by 28 U.S.C. § 1782. To obtain discovery under 28 U.S.C. § 1782, the applicant must satisfy the statutory requirements as well as several specific discretionary factors. The discovery the Republic seeks meets the minimal showings required by Section 1782 and is highly relevant and narrowly tailored to the Treaty Arbitration.

---

53 Ex. 49, Transcript for Oct. 1, 2009 (12:06:19) at 6.
54 Ex. 50, Transcript for Oct. 1, 2009 (12:21:36) at 11.
55 Ex. 51, Transcript for Oct. 7, 2009 (21:30:56) at 11-12.
56 Ex. 50, Transcript for Oct. 1, 2009 (12:21:36) at 13-14.
57 Ex. 52, Transcript for Oct. 31, 2009 (20:36:08) at 34-35.
58 Ex. 48, Transcript for Oct. 1, 2009 (12:36:08) at 8.

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

A. The Information Sought In The Republic's Requested Discovery Is Highly Relevant and Presumptively Discoverable Under Section 1782

Section 1782 authorizes federal district courts, "upon the application of any interested person," to order discovery of a "person [who] resides or is found" in the district "for use in a proceedings in a foreign or international tribunal." 28 U.S.C. § 1782(a). Those statutory requirements are met here. First, Mr. Borja has admitted that he resides in this district. Bloom Decl., Ex. 45. Second, the discovery the Republic seeks is for use in a proceeding before an international tribunal, specifically in the Treaty Arbitration in the Hague. *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 667 (9th Cir. 2002) (confirming that Section 1782 includes international tribunals). Third, as the respondent in the Treaty Arbitration and the host country to the *Lago Agrio* proceeding, which Chevron attacks as being unfair, biased and under the control of the Ecuadorian government, the Republic is an "interested person." *See Intel*, 542 U.S. at 256 ("No doubt litigants are included among, and may be the most common example of, the 'interested person[s]' who may invoke § 1782."). Indeed, Chevron has already made extensive use of Section 1782 itself to obtain discovery in the U.S. of possible judicial improprieties in the *Lago Agrio* action.

Moreover, where the information sought is relevant, it is "presumptively discoverable" under Section 1782. *In re Bayer AG,* 146 F.3d 188, 195-96 (3d Cir. 1998). Courts have ascribed two goals to Section 1782. First, it provides an efficient means for federal courts to assist foreign tribunals and litigants before such tribunals. Second, it encourages foreign countries to provide similar assistance by setting an example. *Govan Brown & Assocs. Ltd. v. Does 1 & 2,* Slip Copy, 2010 WL 3076295 (N.D.Cal. Aug. 6, 2010). District courts have broad discretion to apply Section 1782 to achieve these goals. *See Four Pillars Enters. v. Avery Dennison Corp.,* 308 F.3d 1075, 1078 (9th Cir. 2002). The documents and oral testimony requested in this application further the above goals and are highly relevant to the disputed issues in the Treaty Arbitration, especially with respect to Chevron's claims of "due process" violations. The limited discovery sought by the Republic here — documents and testimony relating to Mr. Borja's employment history, his relationship with Chevron, his wife's employment history at and current relationship with Chevron and his meetings with Mr. Hansen, Judge Nuñez, and other purported Ecuadorian government officials allegedly implicated in

the "bribery scandal" — is focused and relates directly to issues of purported judicial misfeasance raised by Chevron in the Treaty Arbitration. Thus, this Application meets the statutory requirements for discovery under Section 1782, and this Court has discretion to grant the requested discovery.

B. The *Intel* Discretionary Factors Favor Granting The Republic's Application

Where, as here, the Application meets the statutory requirements, the Supreme Court has directed that a court consider four factors to determine whether to exercise its discretion to grant a Section 1782 application: "(1) whether the 'person from whom discovery is sought is a participant' in the foreign case; (2) the nature and character of the foreign proceeding, and whether the foreign court is receptive to judicial assistance from the United States; (3) whether the discovery request is an attempt to avoid foreign evidence-gathering restrictions; and (4) whether the discovery request is 'unduly intrusive or burdensome.'" *London v. Does 1-4*, 278 Fed.Appx. 513, 515 (9th Cir. 2008) (quoting *Intel*, 542 U.S. at 264-66). Each *Intel* factor favors granting the Republic's application.

First, Mr. Borja is not a participant in the Treaty Arbitration between the Republic and Chevron, and the Treaty Tribunal has no jurisdiction over him. According to Mr. Borja, he may be called as a fact witness by Chevron before the Treaty Tribunal to testify against the Republic on the issue of judicial bribery and corruption. The Republic too may wish to call him as a witness.

Second, Section 1782 applications have been routinely granted in aid of foreign proceedings similar to the Treaty Arbitration. *See, e.g., In re Oxus Gold PLC*, 2007 WL 1037387, at *5 (D.N.J. Apr. 2, 2007) (Bilateral Investment Treaty arbitration constitutes a valid "foreign tribunal" for purposes of Section 1782); *Ukrnafta v. Carpatsky Petroleum Corp.*, 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009) (arbitration under UNCITRAL rules "falls within the purview of Section 1782").

Third, this Application is not an attempt to avoid foreign evidence-gathering restrictions. There is no UNCITRAL rule that prohibits the gathering of evidence via Section 1782. As shown above, Section 1782 has previously been used in aid of UNCITRAL proceedings and Chevron has sought and obtained Section 1782 discovery for use in the Treaty Arbitration at issue here.[59] The

[59] *In re Applic. of Chevron Corp.*, No. 1:10-mi-00076-TWT-GGB, Order (N.D. Ga. Mar. 2, 2010); *Chevron Corp. v. Stratus Consulting, Inc.*, No. 10-cv00047-JLK, Trans. (D. Colo. Mar. 4,

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

members of the Treaty Tribunal have no apparent authority under the BIT or UNCITRAL rules to order Mr. Borja's pre-hearing deposition, so Section 1782 provides the Republic with its only available avenue of such discovery.

Fourth, the Republic's Application is not unduly intrusive or burdensome. Mr. Borja's conduct and knowledge is directly relevant to the Treaty Arbitration because Chevron contends that the Republic is internationally liable for Judge Nuñez's alleged corruption. *See* Ex. 19, Notice of Arbitration ¶¶ 52-53. The Republic's document requests and deposition topics are narrowly tailed to discover Mr. Borja's knowledge of these topics and the veracity of his accusations. Further, Mr. Borja knowingly, willingly and eagerly injected himself into the dispute and is thus deemed at least on constructive notice that he may be called as a witness.

CONCLUSION

For the foregoing reasons, the Republic of Ecuador respectfully requests that this Court grant its application for the issuance of subpoenas under 28 U.S.C. § 1782.

Dated: September 10, 2010

WINSTON & STRAWN LLP

By: _____

Eric W. Bloom
C. MacNeil Mitchell
Richard A. Lapping

Attorneys for Applicant
The Republic of Ecuador

SF:291093.2

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

2010); *In re Applic. of Chevron Corp.*, 2010 WL 1801526, *1 (S.D.N.Y. May 10, 2010), *aff'd* No. 10-1918 (2d. Cir. July 15, 2010); *In re Applic. of Chevron Corp. v. 3TM Consulting, LLC*, No. 4:10-mc-134, Order (S.D. Tex. Apr. 5, 2010); *In re Applic. of Chevron Corp.*, No. 10-cv-1146-IEG (WMc), Order (S.D. Cal. Jun. 23, 2010); *In re Applic. of Chevron Corp.*, No. 2:10-cv-02675-SRC-MAS, Trans. (D. N.J. Jun. 11, 2010); *In re Applic. of Chevron Corp.*, No. 1:10-mc-00371-CKK, Order (D. D.C. July 22, 2010).